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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 336 Misc.

JAMES BASHAM,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

DAVID J. MOUNTAN, JR.,
Attorney for Respondent,
Office & P. O. Address,
20 Exchange Place,
New York 5, N. Y.

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Opinions Below

The unanimous affirmance by the Court of Appeals, without opinion, of the judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, is officially reported in 11 N. Y. 2d 991. The affirmance by the Appellate Division of the Supreme Court in the Second Judicial Department, with memorandum decision and with dissenting memorandum opinion by Kleinfeld, J., of the judgment of the Supreme Court of the State of New York, County of Kings, dismissing the plaintiff's complaint, is officially reported in 10 A. D. 2d 948. The opinion

of the Trial Court is not officially reported, but is printed in full in the Record on Appeal to the Appellate Division—Second Department (R.* 625-638).

Jurisdiction

The petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. § 1257 (3).

Question Presented

Whether or not certiorari should be granted to review a judgment of the Court of Appeals of the State of New York, which unanimously affirmed a judgment entered on an order, dated May 2, 1960, of the Supreme Court of the State of New York in the Second Judicial Department, which affirmed a judgment of the Supreme Court of the State of New York in favor of the defendant, entered in Kings County on February 5, 1958 upon a dismissal of the complaint by the Court at a Trial Term, in an action brought under the Federal Employers' Liability Act, Title 45 U.S.C. Sec. 51 *et seq.*, where against the bald statements of the plaintiff and his witness that the platform on which he was standing moved causing injury to the plaintiff, the defendant produced unrebutted evidence that the platform was immovable and that, therefore, movement was not reasonably foreseeable.

ARGUMENT

No negligence on the part of the defendant contributed to the happening of plaintiff's accident.

The petitioner seeks the granting of a writ of certiorari in this case upon the ground that the plaintiff proved a

* References with the prefix R are to the Folios of the Record on Appeal to the Appellate Division—Second Department.

prima facie case, and that the Court of Appeals and Appellate Division, Second Department, were not justified in affirming the action of the Trial Court in setting aside a jury verdict in favor of the plaintiff in an action under the Federal Employers' Liability Act (Title 45 U.S.C.A. § 51 *et seq.*).

It is clear from the recent pronouncement of this Court in the case of *Inman* v. *Baltimore & Ohio R. Co.*, 361 U. S. 138, that the Federal Employers' Liability Act does not make a railroad employer an insurer and that negligence on the part of the defendant railroad must be shown by competent evidence before an employee plaintiff can recover.

This conclusion is buttressed by the holding of this Court in *New York, New Haven & Hartford R. Co.* v. *Henagan*, 364 U. S. 41.

It is claimed in this case that the defendant was negligent in failing to provide a clamp, brake or other locking device to prevent the platform on which the plaintiff was working from moving, and that the platform did move during the course of the work, thereby causing injury to the plaintiff.

The respondent respectfully submits that the proof in this case fails completely to establish any negligence on the part of the defendant which caused or contributed to the plaintiff's accident for two reasons. First, because the platform could not, as a physical fact, move, and secondly, because the defendant could not reasonably foresee that the platform could move and cause injury to the plaintiff.

(A) The platform did not move.

Although both the plaintiff and his witness, Harper, testified that the platform moved, neither the plaintiff nor Harper stated in which direction the platform moved or

the extent of the claimed movement (R. 125, 191, 222, 224, 225).

Against the bald statements of the plaintiff and Harper that the platform moved, we have the overwhelming proof that, at the time of the accident, the platform was an integral part of the passenger coach weighing eighty tons and that it was held rigidly in place and could not move (R. 404-405).

In his statement of facts in this case, petitioner's counsel refers to the hoist platform on which the plaintiff was standing as movable. Concededly, the platform was movable at certain times since the platform was used to move wheel assemblies back and forth in the pit in the process of renewing wheels on cars (R. 74, 75, 79, 98-102) [petitioner's witness Harper said that with a pair of wheels, which weighs tons, on the hoist platform it took four men to move it out from under the car (R. 241)]. However, the plaintiff's evidence established that at the time of the accident, the journal boxes on the wheels which were being inserted into the truck had moved at least as far up into the pedestal lining as in the position shown in defendant's Exhibits B and C (R. 172-174, 243, R.P.** 199 and R.P. 201). The evidence is uncontradicted that with the wheels in such position, it was not physically possible for the platform to move (R. 397-402, 425).

One has only to look at the photographs of the apparatus involved, both those introduced by the plaintiff (R.P. 193, R.P. 195) and those introduced by the defendant (R.P. 197, R.P. 199, R.P. 201, R.P. 205) to come to the firm realization that the testimony of the plaintiff and his witness to the effect that the platform moved, is incredible. In this connection, it is to be noted that although the plaintiff testified that he saw the platform move (R. 191) he also testified

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** R.P. References with the prefix R.P. are to Pages of the Record on Appeal to the Appellate Division—Second Department.

that he was holding a helical spring on its cup with both hands as shown in the photograph received as Defendant's Exhibit D (R. 179, 180, R.P. 205), which put him in a position that made it practically impossible for him to see the platform.

The respondent respectfully submits that against the uncontradicted testimony that the platform was immovable, the testimony of the plaintiff, and his witness that the platform moved is in the words of this Court "too slender a reed" upon which to base a verdict for the plaintiff.

(B) The defendant could not reasonably foresee that the platform could move.

It is uncontested that the repair pit involved in this accident was of the type in general use in railroad yards throughout the country, and that no clamp, brake or other locking device was provided for in the design of such pit (R. 429-434). There was a complete absence of testimony that an accident similar to that claimed by the plaintiff had ever occurred either in any of the pits maintained by the defendant or in any similar pit maintained by any other railroad.

It is clear that a hook and eye could serve no useful purpose once the journal boxes had become interwoven with the pedestal linings as they had become at the time of the accident, because at that time all of the apparatus became rigidly fixed, with the exception of movement of the cylinder and the wheel assembly in an upward direction (R. 423). The respondent's evidence established that the hook and eye which had been installed in another pit was to assure that the platform was in position when the men went to work, and that the hook had not been replaced when the table was renewed (R. 382, 383, 423).

There was complete absence of any "probative facts from which the jury could find that respondent was or

should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did." (*Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500.)

The evidence clearly demonstrates that the defendant could not reasonably foresee that the platform could move and cannot be charged with negligence under the circumstances. (*Brady* v. *Southern Ry. Co.*, 320 U. S. 476.)

The doctrine of reasonable foreseeability was again acknowledged by this Court in its denial of a writ of certiorari to the Pennsylvania Supreme Court in *Hoover* v. *Pennsylvania R. Co.*, 369 U. S. 873.

CONCLUSION

It is respectfully submitted that, there being no basis for the writ, the petition should be denied.

Respectfully submitted,

DAVID J. MOUNTAN, JR.,
Attorney for Respondent.